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No. 05-1318

In the Supreme Court of the United States

RUSSELL G. RUGGERIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's condominium was encumbered by the government's federal tax liens.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the *Federal Reporter*, but is *reprinted in* 153 Fed. Appx. 242. The opinion of the district court (Pet. App. 8-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. A petition for rehearing was denied January 17, 2006 (Pet. App. 13-14). The petition for a writ of certiorari was filed on April 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1998 and 2002, the Commissioner of Internal Revenue assessed delinquent payroll taxes

against Rocky A. Kimbrew, who, at the time, owned a condominium in Worcester County, Maryland. Pet. App. 2-3. The assessments gave rise to tax liens on all of Kimbrew's property, including the condominium. See 26 U.S.C. 6322. In January 2003, after all the taxes had been assessed, Kimbrew contracted to sell the condominium to petitioner. On April 7, 2003, the Commissioner filed notices of the tax liens in the Worcester County land records. The next day, April 8, 2003, Kimbrew executed and delivered a deed to the condominium to petitioner, who recorded the deed several days later. Pet. App. 2-3.

2. After the Commissioner demanded that petitioner pay the government for the release of the tax liens, petitioner brought suit to quiet title. Pet. App. 3. Petitioner contended that because he had signed the contract to purchase the condominium before the Commissioner recorded the notices of the tax liens, the condominium was not encumbered by the liens. *Ibid.* The district court agreed with petitioner and granted summary judgment in his favor. *Id.* at 8.

The district court assumed that the tax liens had attached on April 7, 2003, the date on which the Commissioner had filed the notices of the tax liens. The court reasoned that, as of that date, the only interest retained by Kimbrew was his anticipated proceeds of sale under the January 2003 contract. Accordingly, the court held that the federal tax liens had attached to the proceeds of sale rather than the condominium. Pet. App. 11-12.

3. The court of appeals reversed and remanded in an unpublished opinion. Pet. App. 1-7. The court observed that, pursuant to 26 U.S.C. 6322, federal tax liens attach to a taxpayer's property on the date the taxes are assessed, not the date the notices are filed. Pet. App. 4.

Because the last tax assessment had been made, and the last tax lien thus had attached, by the end of 2002, the court concluded that the federal tax liens had attached to the condominium before Kimbrew contracted to sell it to petitioner in January 2003. *Ibid.*

Petitioner argued that the federal tax liens could not be enforced against him because the January 2003 contract had made him a "purchaser" within the meaning of 26 U.S.C. 6323, under which a federal tax lien is invalid against a "purchaser" until notice of the lien is filed. The court of appeals rejected petitioner's argument. The court explained that, whether petitioner was a "purchaser" for purposes of Section 6323 depended on whether his contractual interest in the condominium was "valid under local law against subsequent purchasers without actual notice." Pet. App. 5 (quoting 26 U.S.C. 6323(h)(6)). The court concluded that, under Maryland law, petitioner's contractual interest would not be superior to the interest of a subsequent purchaser who lacked notice of petitioner's interest and who recorded his deed first. *Id.* at 6. The court therefore held that petitioner was not a "purchaser" within the meaning of the statute. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. A federal tax lien attaches to all the taxpayer's interests in property on the date the tax is assessed, without the need for filing or recordation. 26 U.S.C. 6321, 6322; *United States* v. *Snyder*, 149 U.S. 210, 214 (1893). The nature of the taxpayer's interest is deter-

mined by state law, but whether that interest is a "property" interest, to which a lien may attach, is determined by federal law. *E.g.*, *United States* v. *Craft*, 535 U.S. 274, 278-279 (2002); *Morgan* v. *Commissioner*, 309 U.S. 78, 82 (1940).

Petitioner contends (Pet. 9-10) that, under Maryland law, he received equitable title to the condominium when Kimbrew contracted to sell it to him. Petitioner's contention is simply beside the point, as any equitable interest he received was subject to the preexisting tax liens. The taxes all had been assessed, and the tax liens thus had attached to the condominium, by the end of 2002. The contract of sale, however, was not signed until January 2003. Any interest that petitioner received from Kimbrew by virtue of the contract thus came with the liens attached.

Accordingly, there is no merit to petitioner's argument (Pet. 6-10) that the decision below conflicts with the principle, reflected in this Court's decisions, that state law determines the nature of property interests to which federal tax liens attach. Petitioner focuses on the nature of Kimbrew's interest in the condominium after the January 2003 contract of sale. The federal tax liens had already attached by that time, however, and there is no dispute that, when the liens attached during 2002, Kimbrew's interest in the condominium (as determined by Maryland law) was a property interest.

Petitioner's argument (Pet. 10-13) that the decision below conflicts with the district court's decision in *SMS Assocs.* v. *Clay*, 868 F. Supp. 337, 344-345 (D.D.C. 1994), aff'd, 70 F.3d 638 (D.C. Cir. 1995), is also wide of the mark. Unlike the case at hand, in *SMS Associates*, the contract purchaser had perfected its interest against the other claimants, including the federal government, by

recording a *lis pendens* before the other claimants' liens were recorded. 868 F. Supp. at 344-345. The government conceded that the contract purchaser thus had priority over the federal tax liens. *Id.* at 343, n.10. In that regard, *SMS Associates* is an unremarkable illustration of the "first in time, first in right" doctrine. See *United States* v. *City of New Britain*, 347 U.S. 81, 85 (1954) ("priority of * * * liens is determined by another principle of law, namely, 'the first in time is the first in right'") (citation omitted). The court of appeals' decision below is fully in accord with that principle, as petitioner had not perfected his interest in the condominium before the notices of the federal tax liens were filed.

2. Petitioner errs in relying (Pet. 14-18) on 26 U.S.C. 6323, under which a federal tax lien is invalid against a "purchaser" until notice of the lien is filed. See 26 U.S.C. 6323(a) and (f). Section 6323 requires that, for a person to be a "purchaser," his title must be superior to that of subsequent purchasers without actual notice. 26 U.S.C. 6323(h)(6). In *Newnham* v. *United States*, 813 F.2d 1384, 1385 (9th Cir. 1987), on which petitioner mistakenly relies (Pet. 16), the purchaser had acquired her interest through a contract for sale and had filed a *lis pendens*, which made her interest superior to that of subsequent purchasers without actual notice. 813 F.2d at 1385. *Newnham* thus provides no support for petitioner. Because petitioner, by the time the notices of tax liens were filed, had not recorded his interest so as to perfect it against subsequent purchasers without actual notice, the tax liens were "first in time" and "first in right."

Petitioner errs in arguing (Pet. 16-18) that the court of appeals misapplied the Maryland law of equitable conversion. The court correctly followed its decision in

Bourke v. *Krick*, 304 F.2d 501, 504 (4th Cir. 1962), by holding that the equitable interest conveyed by an unrecorded contract for sale may be destroyed by the conveyance of a deed to a bona fide purchaser without actual notice, if the latter records his deed first. As the court explained in *Bourke*, "[t]he time honored fiction of equitable conversion has been found useful in certain situations, but it has not heretofore been supposed that it operates to unsettle the statutory scheme for tracing legal title to real estate." *Id.* at 505. The interpretation of the equitable conversion doctrine erroneously advanced by petitioner, under which an unrecorded contract for sale would take precedence, "would subvert the very purpose of [Maryland's] recording statutes." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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